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Supreme Court, U.S.
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In the

Supreme Court of the United States

OCTOBER TERM, 1989

RICHARD A. HOLMAN and WALL STREET REPORTS AND INTELLIGENCE BULLETIN, INC.,

Petitioners,

v.

L. METCALFE WALLING,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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March 14, 1990

Questions Presented

1. When the shape of the trial is substantially changed by an intentional, wilful misrepresentation by counsel, on which the trial court relied to receive otherwise inadmissible evidence that was the sole support for respondent's claim, may a court of appeals reviewing, *inter alia*, the denial of a new trial motion under Fed. R. Civ. P. 59, reject charges of fraud on the court, reject full disclosure, refuse to consider offered proof, and refuse to permit a requested evidentiary hearing all designed to show the likelihood that the jury would have reached a different outcome absent the fraud?

2. Were petitioners deprived of their Fifth and Seventh Amendment rights when the court of appeals reinstated a claim that had been dismissed at the close of respondent's case-in-chief, thereby preventing petitioners from proving any defenses, and substituted the court's finding on a claim never presented to the jury?

3. Did the courts below err under *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), in prohibiting petitioners from proving their offset and affirmative damages under the New York statute, Real Prop. L. § 235-b, whose application to the case was directed in the court of appeals' original mandate?

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In the

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OCTOBER TERM, 1989

RICHARD A. HOLMAN and WALL STREET REPORTS AND INTELLIGENCE BULLETIN, INC.,

Petitioners,

v.

L. METCALFE WALLING,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners Richard A. Holman and Wall Street Reports and Intelligence Bulletin, Inc., respectfully pray that a writ of certiorari issue to review the order and mandate of the United States Court of Appeals for the Second Circuit, entered in this proceeding on December 15, 1989.

Order Below

The order and mandate of the Court of Appeals appears in the Appendix at 1a.

Jurisdiction

The order of the Court of Appeals for the Second Circuit was entered on December 15, 1989. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Constitutional Provisions and Rule Involved

The Fifth Amendment to the United States Constitution: "nor shall any person . . . be deprived of life, liberty, or property, without due process of law . . . . "

The Seventh Amendment to the United States Constitution: "In suits at common law . . . the right of trial by jury shall be preserved . . . . "

Fed. R. Civ. P. 59(a): "A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States . . . . "

Statement of the Case

This is a landlord-tenant diversity case brought in the federal court against petitioners for conversion and breach of contract. Respondent landlord claimed that petitioners, one of which had rented respondent's house over an eleven-year period, converted certain items of personal property belonging to respondent and had failed to repair a leaky roof causing damage to the house for which respondent sought recovery.

At trial, the sole evidence in respondent's case-in-chief of the claimed conversion came by way of the deposition of Ida Bellotti. Counsel for respondent represented to the court that Mrs. Bellotti was too ill to attend, a representation that petitioners offered to refute. Petitioners objected to the introduction of the deposition testimony and advised the court that Mrs. Bellotti was available to testify at trial. Without any inquiry into the factual basis of respondents' representation, the court overruled petitioners' objection and received the deposition, pursuant to Fed. R. Civ. P. 32(a)(3). In admitting the deposition the court expressly relied on the representation of respondents' counsel that the witness was "unable to attend because of illness." (App. 22a) The trial judge later made clear that he relied solely on the representation of counsel by charging the jury as follows: "During plaintiff's preparation [*sic*] of his case, he read the testimony of Mrs. Bellotti. That was permitted on the representation that she could not appear here personally to testify from the witness stand" (App. 49a)

The crux of the deposition testimony used by respondent was that Mrs. Bellotti recalled having attended a "tag sale" at respondent's house during which items of personal property were sold. The transcript was the only evidence presented by respondent to support his conversion claim. With this one piece of evidence respondent rested his case on conversion. The deposition was taken at Justice Court, Route 117, Bedford, New York.

The representation by counsel for respondent on which the trial court relied in admitting the deposition testimony was exposed as false the next day when Mrs. Bellotti walked unaided into the courtroom to testify pursuant to a subpoena issued by petitioner. Mrs. Bellotti testified at trial that she erred in her deposition testimony and was now certain that the house she saw at the "tag sale" was not the one respondent rented to petitioners. (App. 37a)

In the face of this testimony, after petitioners had rested their case in defense the court permitted "rebuttal" testimony by respondent himself. Respondent testified to a conversation he allegedly had with Mrs. Bellotti consistent with her deposition testimony. This "rebuttal" testimony was permitted as so-called "impeachment of a recantation." The trial court prohibited petitioners from presenting any more evidence, and thus petitioners were unable to recall Mrs. Bellotti and call other witnesses to deny or explain the conversation or to present any further evidence on the supposed "tag sale." Petitioners detailed to the court below evidence they were prepared to present by deposition or in an evidentiary hearing which, if presented to the jury, would have created a strong likelihood of a different jury verdict.

Although respondent alleged both contract and conversion claims, the trial court dismissed the contract claim with respect to the personal property at the end of respondent's case-in-chief. No evidence concerning the purported bailment contract was (or could have been offered) by petitioners. The trial court submitted only the conversion claim (on the issue of the lost personalty) to

the jury which was evidently persuaded by the improperly admitted deposition testimony and by respondent's hearsay testimony to which petitioner was unable to respond because it was presented only after petitioner had rested. The court also permitted the jury to award damages against petitioner for water damage to the premises resulting from the leaky roof, despite petitioner's argument that N.Y. Real Prop. L. § 235-b, made the landlord, not the tenant, liable for any such damage.

Petitioners moved pursuant to Fed. R. Civ. P. 59(a) for a new trial and sought leave to take depositions to show: (i) how counsel's wilfully false representation and how the improperly admitted transcript had altered the course of trial; and (ii) additional evidence that no such "tag sale" had taken place at the home of respondent rented by petitioner, but that a "tag sale" had taken place at a different house which had been owned and occupied by respondent during all the time Mrs. Bellotti knew him and his wife, and other evidence which would have created a strong likelihood of a different jury verdict. The court denied the motions (App. 13a, 15a).

Petitioners appealed the verdict on a number of grounds: First, they argued that the trial court improperly permitted respondent to introduce the deposition testimony of Mrs. Bellotti on the representation of respondent's counsel, and then failed to cure the fraud on the court when it was shown that the representation was false. Second, they argued that the conversion claim was time barred. Third, they argued that the trial court improperly prevented it from proving damages against respondent based on the latter's violation of N.Y. Real Prop. L. § 235-b.

The court of appeals rejected petitioners' argument that the misrepresentation by counsel for respondent subverted the fair administration of justice and rejected the claim that the fraud on the court had tainted the entire proceeding (App. 6a). First, without referring to the statement by

the trial judge as to why he received the deposition testimony, the court said that the trial judge received the deposition into evidence based upon Mrs. Bellotti's deposition testimony that she had arthritis which made climbing stairs difficult. (App. 6a) Second, the court of appeals excused counsel's misrepresentation by finding that "any fraud" would have been exposed (and any possible prejudice avoided) "when [petitioners] produced Bellotti in person as their witness" (App. 6a). In refusing to consider petitioners' claim that respondent's counsel had committed a fraud on the court, the court of appeals said "[w]e consider [the trial judge's] decision to forego [any] sanctions dispositive." The court did not address petitioners' application for full disclosure, discovery or a full evidentiary hearing in aid of its motion for a new trial.

The court of appeals agreed that the conversion claim was time-barred, but instead of reversing, the court affirmed on a ground not before the jury—namely, that the alleged conversion would have supported a breach of contract claim. The court of appeals held that the trial judge improperly refused to charge on the breach of contract claim, and found that if that claim had been submitted to the jury, the jury would have found that petitioner had breached the contract and that the damages would have been identical.

The court of appeals also held that the trial judge had erred in not charging the jury on New York's statutory warranty of habitability. The circuit court held that a recalculation of damages was required because N.Y. Real Prop. L. § 235-b imputes an implied warranty of habitability into every "written or oral lease or rental agreement for residential premises." The court of appeals held that the leaky roof water damage caused to the premises was respondent's responsibility under § 235-b, notwithstanding lease language to the contrary. *Walling v. Holman*, 858 F.2d 79 (2d Cir. 1988). (A copy of the opinion is annexed at App. 2a-10a). Petitioners petitioned in separate motions

for rehearing *in banc* raising claims that the substitution of the appellate court's findings on the claim not before the jury (the breach of contract claim) deprived them of their Fifth and Seventh Amendment rights. The court denied both motions. The circuit court remanded for correction in application of Section 235-b and damages. Although the judgment was not final, petitioners petitioned this court for a writ of certiorari, which was denied. 109 S.Ct. 1537 (1989).

On remand, the trial court readjusted slightly plaintiff's damages, but prohibited petitioners from proving their offset and damages under N.Y. Real Prop. L. § 235-b. The court also denied petitioners' motion under Fed. R. Civ. P. 15(b) to amend its answer to add a counterclaim for respondent's breach of § 235-b.* Petitioners appealed again, but the court of appeals, without opinion, affirmed the judgment (App. 1a). This petition follows entry of final judgment on remand.

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* Petitioners had raised the issue of § 235-b damages through their answers and in the presentation of their case at trial, as well as in their briefs to the court of appeals on the first appeal.

REASONS FOR GRANTING THE WRIT

I

When the shape of the trial is substantially changed by an intentional, wilful misrepresentation by counsel, on which the trial court relied to receive otherwise inadmissible evidence that was the sole support for respondent's claim, a court of appeals reviewing, *inter alia,* the denial of a new trial motion under Fed. R. Civ. P. 59, may not reject charges of fraud on the court, reject full disclosure, refuse to consider offered proof, and refuse to permit a requested evidentiary hearing all designed to show the liklihood that the jury would have reached a different outcome absent the fraud.*

Petitioners were denied a fair trial because the trial court received evidence on the basis of a misrepresentation by counsel, and then took no steps, once it became obvious that the representation was false, to cure the taint. The court of appeals compounded the error by fashioning a rule that effectively insulates such determinations by the trial court from review and improperly placing on the victim of the misrepresentation the burden of showing how he was harmed without permitting full disclosure through an evidentiary hearing, after proper proffer, to show how the misrepresentation constituted a fraud on the court, how it altered the outcome, and how with additional evidence there would have been a strong likelihood of a different jury verdict.

It is an elementary proposition that the administration of justice in federal courts depends to an enormous extent on the professional and ethical conduct of counsel. It is equally self-evident that much of the judicial business depends on

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* This issue was raised in petitioner's petition for certiorari based on the first court of appeals' decision before final judgment has been entered in the case (App. 2a-10a) (Petition dated February 1, 1989). It is being raised again now that final judgment has been entered.

the court's ability to rely on representations of counsel. When this system breaks down, not only do the litigants suffer, but the fair administration of justice in federal courts becomes impossible, and public confidence in the integrity of the federal judicial system is eroded.

In this case, respondent's counsel employed an artifice to introduce evidence that otherwise would not have been available to him: he represented to the court, contrary to the facts, that a witness was "unavailable." The representation was sharply disputed by petitioners, but instead of resolving the factual issue, the trial court put petitioners to a dilemma —to prove the representation false by producing the witness in their own case. Nevertheless, the court received the "evidence" in respondent's case, thus permitting respondent to make out a *prima facie* case where otherwise there would have been none.

When the representation proved plainly false—the witness attended court unaided with no signs of illness that would have prevented her from testifying—the court treated the misrepresentation as harmless. But in fact it had subverted the entire trial. Not only did it allow respondent to make out a *prima facie* case, it also skewed the presentation of evidence. The jury first heard Mrs. Bellotti's deposition testimony, then petitioners were required to bring her to trial to deny her earlier statement. The court thus placed its imprimatur on the deposition testimony, and unintentionally created in the minds of the jury the impression that petitioners had caused her to change her testimony. Moreover, the court allowed respondent to "rebut" her testimony—not in his own case, as he would have had to do if the deposition was ruled inadmissible—but after petitioners had rested. And by refusing to allow additional evidence, the court permitted respondent's hearsay testimony to go unchallenged. All of this could have been achieved only by the misrepresentation concerning Mrs. Bellotti's availability.

The trial court then refused to take any action to cure the taint—it denied petitioner's motion for a new trial and

refused to allow any investigation into the question of how the misrepresentation altered the outcome of the trial.

The court of appeals treated the issue as though it were entirely within the province of the trial judge. The court noted that the trial judge could not have been "defrauded" because he saw that the misrepresentation was false. The court's reasoning apparently is that once a litigant has shown a court that a misrepresentation it relied on is false, it is then solely within the unreviewable discretion of the trial court to determine what, if anything, should be done. This is evidently so because the court itself said: "We consider [the trial judge's] decision to forego any sanctions dispositive."

The decision was erroneous for two reasons. First, it assumes that wilful misrepresentations can only amount to a fraud if the trial court is unaware of the falseness. Moreover, it set an impossible standard for showing how the misrepresentation affected the trial. In short the court of appeals abdicated its responsibility to independently review the effect of the misrepresentation and denied petitioners the right to prove the effect.

Petitioners respectfully submit that the appeals court's refusal to permit an evidentiary hearing and its refusal to independently review what sanctions were appropriate, including dismissing the case, was error as a matter of law. The court of appeals apparently believed that it was petitioner's burden to show how it was specifically harmed, but that rule conflicts with this Court's own standard in *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 246 (1944), where the Court observed:

> [T]ampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistent with the good order of society. Surely it cannot

> be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud.

In *Hazel-Atlas* this Court held that violation of this standard would result in nothing less than a complete denial of relief. *Id.* at 250. Moreover, it is not sufficient that the trial court may have had the means of determining the falseness of the misrepresentation as a case related to *Hazel-Atlas* clearly shows. In *Shawkee Manufacturing Co. v. Hartford-Empire Co.*, 322 U.S. 271 (1944), this Court held that the misrepresentation in *Hazel-Atlas* could not have been remedied by the adversary's advice to the court of the falseness of the representation. The Court said that in the circumstances it was the duty of the party making the misrepresentation to make "a full disclosure of its fraudulent conduct." *Id.* at 273. Certainly here petitioners should have had the same opportunity to have full disclosure to the jury.

In this case, the trial court relied on respondent's misrepresentation, over the objection of petitioners' counsel, to the detriment of not only petitioners, but of the judicial system. The trial judge accepted without inquiry the deposition testimony as to the witness's unavailability. He refused petitioners' post-trial motions for an evidentiary hearing and to take depositions including Mrs. Bellotti's (App. 13a) and for a new trial (App. 15a). Yet the court of appeals treated the trial court's holding as unreviewable, saying "[W]e consider his decision to forego . . . sanctions dispositive" (App. 6a).

In so holding, the court below disregarded this Court's repeated admonitions that an orderly and efficient judicial system requires that the courts rely on the representations of counsel. *Deakin v. Monaghan*, 484 U.S. 193, 199 n.3 (1988). Although finality in this case is certainly a consideration, this Court has routinely found that misrepresentation by

counsel is so insidious to the functioning of the truth-seeking functions of a trial that other countervailing policy considerations, including constitutional rights, are subordinated. *See, e.g., Taylor v. Illinois,* 484 U.S. 400, 416-18 (1988); *Frisby v. Schultz,* 487 U.S. 474 (1988). *See,* 7 *Moore's Federal Practice,* ¶ 60.33 at 359-60 (1987). *See also, Wheat v. United States,* 486 U.S. 153 (1988).

The court of appeals' decision also sets a standard which effectively bars appellate review of the trial court's treatment of a fraud. The court of appeals excused respondent's fraud based on the district court's review of Mrs. Bellotti's deposition and its observation of her condition when she testified (App. 6a). The focus of its inquiry should rather have been simply on the impact this wilful misrepresentation had on the trial. The court should have remanded with instructions to dismiss the complaint or conduct a new trial, or at a minimum it should have remanded with instructions for full disclosure and an evidentiary hearing to determine the appropriate remedy for the fraud. By refusing to address the trial court's denial of petitioners' request for full disclosure, an evidentiary hearing and discovery, the court of appeals improperly restricted petitioners' ability to show the impact of the fraud on the trial.

Hazel-Atlas and its progeny require sanctions for fraud on the court without regard to prejudice or actual injury to the litigants. Even were prejudice required, however, respondent's fraud in this case would be sanctionable. The deposition testimony of Mrs. Bellotti, as bolstered by respondent's rebuttal testimony, that she had a attended a tag sale at respondent's home was crucial to the jury's verdict for respondent on conversion.

If the judgment below is allowed to stand, it will squarely conflict with the Fifth Circuit's rule that when a misrepresentation by counsel to the court has occurred (on which the court relied for a decision affecting trial), the court must examine whether the misrepresentation prevented the aggrieved party from "fully and fairly presenting [her] case."

Rozier v. Ford Motor Co., 573 F.2d 1332, 1339 (5th Cir. 1978) (reversal for failure to produce document which could have changed the course of the trial).

The rule of the Fifth Circuit, and those following such an approach, *e.g.*, *Virgin Islands Housing Authority v. David*, 823 F.2d 764 (3d Cir. 1987) (misrepresentation of court opinion), is clearly preferrable and the only workable approach. It does not lie in the mouth of a party taking advantage of a false representation to the court to request "'the benefit of calculation which can be little better than speculation, as to the extent of wrong inflicted upon his opponent.'" *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1346 (5th Cir. 1978), *quoting Minneapolis, St. Paul & S.S. Marie Ry. Co. v. Moquin*, 283 U.S. 520, 521-22 (1931).

The court of appeals here not only allowed the wrongdoer to argue that calculation, but also entirely abdicated its responsibility to independently review the result of the misrepresentation. It did so by holding that the admission of Mrs. Bellotti's deposition testimony was a nonreviewable discretionary ruling by the trial judge. It is clear from the record that the trial court accepted and relied upon without reasonable inquiry the false representation of counsel. The trial judge charged the jury that the reading of the Bellotti transcript "was permitted on the representation that she could not appear here personally to testify from the witness stand" (App. 49a).

Instead of considering the damage to the integrity of the judicial process, the court of appeals treated the fraud on the court as if it were a matter of the trial court's unreviewable discretion. Such an approach will not instill the necessary public confidence in the judicial system and punish those who would betray that confidence. Such an approach subverts the administration of justice and defies the high standard of conduct announced by this Court in the *Hazel-Atlas* decision. At the minimum, petitioners should be entitled to full disclosure, an evidentiary hearing, and discovery on the issue of how the wilful misrepresentation

affected the shape and outcome of the trial. With such a showing, petitioners' motion for a new trial should be granted.

II

Petitioners were deprived of their Fifth and Seventh Amendment rights when the court of appeals reinstated a claim that had been dismissed at the close of respondent's case-in-chief, thereby preventing petitioners from proving any defenses, and substituted the court's finding on a claim never presented to the jury.*

The court of appeals compounded its error in denying petitioners a new trial by not only rejecting the petitioners' proffer on the issue of fraud on the court, but also substituting its own factual finding on a claim that had never been presented to the jury. This it did in violation of petitioners' Fifth and Seventh Amendment rights. The constitutional issues under these provisions were presented to the court of appeals by both petitioners in separate motions for rehearing *in banc*, both of which were denied.

Having rejected petitioners' proffer to show both a fraud on the court and that absent the fraud the jury would have come to a different determination, the court of appeals proceeded to reverse the verdict on the issue decided by the jury—namely, the claim of conversion. But it instead upheld the judgment on a claim never submitted to the jury: breach of contract.

This procedure was in direct violation of this Court's decision in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988). There this court held that issues of contract

* This issue was raised in petitioner's petition for certiorari based on the first court of appeals' decision before final judgment has been entered in the case (App. 2a-10a) (Petition dated February 1, 1989). It is being raised again now that final judgment has been entered.

defenses were for the jury, and that a circuit court may modify a jury verdict by substituting a different theory only if there could be no defense to the new claim.

But this could not be the case here. Respondent never showed a contract of bailment for the goods that were claimed to have been converted. Nor was there evidence on the nature of the bailment implied. Nor did petitioners have an opportunity to establish any defense or rebut the supposed existence of such a contract, because the trial judge had dismissed the claim before petitioners' case began.

It is clear from the court of appeals' opinion that it engaged in fact-finding. That substitution of its own conclusions on an issue that had never been submitted to the jury constituted a violation of petitioners' Seventh Amendment rights, and requires a reversal and a new trial.

III

The courts below erred under *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) in prohibiting petitioners from proving their offset and affirmative damages under the New York statute, Real Prop. L. § 235-b, whose application to the case was directed in the court of appeals' original mandate.

The court of appeals held that the trial court erred in disregarding petitioner's rights under N.Y. Real Prop. L. § 235-b, and remanded for "recalculation"* of damages. This could only have meant that petitioners were to be allowed to prove *their damages* and offsets against the rent as the statute requires, and not merely to have the damages against them adjusted. In fact, petitioner was prepared to offer evidence at trial that it brought the matter of a leaky roof to the attention of respondent on various occasions; sought unsuccessfully to have respondent repair the leaky roof, and replace a pool

* At different points in its opinion, the court refers to "recomputation" (App. 4a), "reassessment" (App. 8a) and "recalculation" (App. 10a) of damages.

filter (App. 45a-46a). This evidence would have created offsets and affirmative relief in favor of petitioners, *Park West Management Corp. v. Mitchell*, 47 N.Y.2d 316, *cert. denied*, 444 U.S. 992 (1979). *See, e.g., Kachian v. Aronson*, 123 Misc.2d 743, 746-747 (N.Y. Civ. Ct. 1984) (rent abated under § 235-b for water leakage).*

In sum, the trial court should have, but did not, assess damages or abate the rent due to a diminution of the value of the dwelling caused by respondent's violations of Section 235-b. *See, e.g., 111 East 88th Partners v. Simon*, 106 Misc.2d 693 (N.Y. Civ. Ct. 1980), *modified on other grounds*, 127 Misc.2d 74 (App. Term 1985); *Tower West Associates v. Derevnuk*, 114 Misc.2d 158 (N.Y. Civ. Ct. 1982).

In this instance as well, the court of appeals permitted the trial court to substitute its own process of fact finding for a trial by jury. For this reason alone, this Court should reverse and remand the judgment in order to allow petitioners to place their evidence before a jury.

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* The trial court denied petitioners' motion on remand for permission under Fed. R. Civ. P. 15(b) to add a counterclaim for breach of § 235-b (App. 11a). Although petitioners had already put the matter in issue by their pleadings (a general denial of liability for property damage and an affirmative defense that any such damage was respondent's fault) and by testimony at trial, a counterclaim would have been the clearest and most convenient method of assessing petitioners' remedies under the statute.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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Order of Affirmance of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 15th day of December, one thousand nine hundred and eighty-nine.

PRESENT:

HONORABLE ELLSWORTH A. VAN GRAAFEILAND,
HONORABLE LAWRENCE W. PIERCE,
HONORABLE ROGER J. MINER,
Circuit Judges.

L. METCALFE WALLING,

Plaintiff-Appellee,

v.

RICHARD A. HOLMAN and MARY HOLMAN, his Wife, and WALL STREET REPORT and INTELLIGENCE BULLETIN, INCORPORATED,

Defendants.

RICHARD A. HOLMAN and WALL STREET REPORT and INTELLIGENCE BULLETIN, INCORPORATED,

Defendants-Appellants.

ORDER
89-7681
89-7683

As stated in open court, the judgment of the district court is AFFIRMED. The mandate shall issue forthwith.

ISSUED AS MANDATE:
December 15, 1989

/s/ Ellsworth A. Van Graafeiland
HONORABLE ELLSWORTH A. VAN GRAAFEILAND

/s/ Lawrence W. Pierce
HONORABLE LAWRENCE W. PIERCE

/s/ Roger J. Miner
HONORABLE ROGER J. MINER
Circuit Judges

Opinion of the Court of Appeals
Dated September 19, 1988

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1314, 1315—August Term, 1987

(Argued June 15, 1988 Decided Sep. 19, 1988)

Docket Nos. 88-7073, -7101

L. METCALFE WALLING,

Appellee-Cross-Appellant,

v.

RICHARD A. HOLMAN, MARY HOLMAN, WALL STREET REPORTS AND INTELLIGENCE BULLETIN, INC.,

Defendants,

RICHARD A. HOLMAN, WALL STREET REPORTS AND INTELLIGENCE BULLETIN, INC.,

Appellants-Cross-Appellees.

L. METCALFE WALLING,

Appellant,

v.

RICHARD A. HOLMAN, WALL STREET REPORTS AND INTELLIGENCE BULLETIN, INC.,

Defendants,

MARY HOLMAN,

Appellee.

Before OAKES, MESKILL, and PIERCE, *Circuit Judges.*

Appeal from a jury verdict awarding plaintiff $45,837 in damages for property injury and loss arising from the rental of residential property. *Held,* plaintiff was entitled to recover contractual damages for property loss. District court also failed to apply New York State's warranty of habitability provision, N.Y. Real Prop. Law § 235-b(1), which bars recovery for certain repairs to residential property.

Judgment affirmed in part, reversed in part, and remanded.

Samuel N. Greenspoon, Grutman, Miller, Greenspoon & Hendler, New York, NY, *for Appellant Wall Street Reports and Intelligence Bulletin, Inc.*

Richard A. Holman, New York, NY, *Appellant Pro Se.*

Cletus P. Lyman, Lyman & Ash Philadelphia, PA, *for Appellee Walling.*

Myles C. Cunningham, New York, NY, *for Appellee Mary Holman.*

OAKES, *Circuit Judge:*

Appellants Richard Holman and Wall Street Reports and Intelligence Bulletin, Inc. ("Wall Street Reports") appeal from a judgment entered by the United States District Court for the Southern District of New York, Charles M. Metzner, Judge, holding them liable for the loss of furniture and other furnishings from a rented home in Bedford, New

York, and awarding L. Metcalfe Walling, the homeowner, damages in the amount of $45,837 plus interest.

Appellants' principal arguments are that the district court erred in allowing the deposition of a witness, Ida C. Bellotti, to be read at trial, and that the evidence was insufficient to support the jury's verdict. Appellants also argue that New York Real Property Law § 235-b(1) (McKinney 1988) prohibits recovery of certain damages related to the residential property, that the district court committed error in not dismissing Walling's action as time-barred under New York's three-year statute of limitations, that the court improperly pierced the corporate veil in holding appellant Richard Holman personally liable, and that the court improperly dismissed appellants' counter-claim as abandoned. On cross-appeal, Walling argues that the district court erred in refusing to charge the jury on defendants' contractual liability and on punitive damages and in dismissing appellee Mary Holman from the suit.

As to the cross-appeal, we find that the district court should have given a jury instruction on contractual liability, but that the jury's verdict was not affected by this failure. On Richard Holman's and Wall Street Reports' appeal, we affirm the judgment below except for certain damages awarded, which we reverse and remand to the district court for recomputation.

FACTS

In July 1971, while L. Metcalfe Walling was living abroad, his son rented his father's furnished house in Bedford, New York, to Wall Street Reports as a weekend residence for the corporation's 100% stockholder, Richard Holman. When the lease expired on September 4, 1972, an informal rental arrangement continued between the parties. Letters negotiating rent increases and other terms of occupancy were directed to Richard Holman personally, and bills relating to the property were paid from both Holman's

corporate accounts (including that of another wholly owned corporation, Wall Street Transcripts) and his personal funds. In 1978 Holman married Mary Holman, who sometimes accompanied him to the Walling residence.

In October 1979 Walling's niece, with his consent, removed some furniture from the house and reported to her uncle that that furniture and a piano remaining in the house were damaged. Walling testified that in 1979, when he last visited the property, he noticed that although the house still contained some of his furniture and part of his collection of objets d'art, other pieces were missing. In 1982 Richard and Mary Holman moved out of the house, leaving it empty except for the damaged piano. The roof had leaked, damaging the parquet floors, and a pool filter had to be replaced.

L. Metcalfe Walling commenced this suit on April 10, 1984, seeking recovery of damages based upon at least two[1] distinct theories: the defendants' contractual obligation to leave the house and furnishings in good repair, and the defendants' conversion of the personal property. Judge Metzner instructed the jury to award damages for injury to the house and to personal property in the possession of the plaintiff's niece if it found that the defendants had breached the lease by failing to surrender items in the same condition as they were received, less reasonable wear and tear. He instructed the jury to award damages for missing personal property if it found that conversion had occurred, but he refused to charge the jury on punitive damages or on contractual recovery for the missing items. The jury found for the plaintiff, awarding a total of $45,837 as follows:

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[1]Walling at times announced his intention to pursue a quasi-contractual claim for the missing items by ratifying a fictitious sale to Holman and suing for its proceeds. *See Baratta v. Kozlowski*, 94 A.D.2d 454, 464, 464 N.Y.S.2d 803, 809 (2d Dep't 1983). We need not discuss this further for the basis of recovery we sanction here leads to the same result, except as to cross-appellee Mary Holman. As to her, however, there has been no request for relief in the event of affirmance.

Breach of Contract

(a) Damage to the parquet floors	$1,950
(b) Damage to the beams and side walls	0
(c) Damage to the pool filter	401
(d) Damage to the glass door	126
(e) Refuse removal	110
(f) Damage to the piano	250
(g) Damage to furnishings in possession of Walling's niece	1,500

Conversion

(a) Damages for missing furnishings and other personal property	41,500

DISCUSSION

Appellants have expended considerable energy attempting to persuade this court that a "fraud on the Court" caused the district court's admission of the deposition of a witness, Ida C. Bellotti, on the ground that she was unable to attend because of infirmity. Plainly there was no such fraud, for the district court was aware that her infirmity was disputed. Appellants' trial counsel, contesting admission of the deposition, claimed to be "reliably informed that she [Bellotti] was playing golf" the previous week. Bellotti, however, testified at her deposition, under oath and in the presence of appellants' counsel, as to the nature of her difficulties, and the district court based its ruling on this testimony. Finally, any "fraud" would have been exposed (and any possible prejudice avoided) when the appellants produced Bellotti in person as their witness. The trial judge was then in a position to observe Bellotti's physical condition and to determine whether sanctions, including striking the deposition from the record, were appropriate. We consider his decision to forego such sanctions dispositive.

Appellants are precluded from challenging the sufficiency of the evidence because they failed to move for a directed verdict at trial in accordance with Fed. R. Civ. P. 50(b). *See Oliveras v. American Export Isbrandtsen Lines, Inc.*, 431 F.2d 814, 816-17 (2d Cir. 1970). We also dispose summarily of appellants' argument that the district court erred in dismissing with prejudice appellants' counterclaim for money expended on repairs. The counterclaim did not appear in the pretrial order, nor was any request made for a jury charge on the claim. Thus, dismissal on the ground of abandonment was proper. *See Schenck v. Bear, Stearns & Co.*, 583 F.2d 58, 60 (2d Cir. 1978).

Next, appellant Richard Holman, noting that the original lease was signed by the corporate defendant, Wall Street Reports, challenges the district court's ruling that he could be held personally liable under the lease for damage to the property. We affirm the district court for two reasons. First, as Judge Fuld wrote in *Walkovszy v. Carlton*, 18 N.Y.2d 414, 418, 223 N.E.2d 6,8, 276 N.Y.S.2d 585, 588 (1966), where "the corporation is a 'dummy' for its individual stockholders who are in reality carrying on the business in their personal capacities for purely personal rather than corporate ends," the stockholders may be held personally liable for corporate debts. *See Brunswick Corp. v. Waxman*, 459 F. Supp. 1222, 1230 (E.D.N.Y. 1978), *aff'd* 599 F.2d 34 (2d Cir. 1979). Here, the use of the corporation to rent a residence for the sole stockholder's use cannot limit Holman's personal liability. Second, the evidence presented at trial showed that Holman personally negotiated extensions of the lease with Walling and supports Judge Metzner's implicit finding that Holman and Wall Street Reports were jointly liable beyond the term of the original lease.

We do not, however, affirm the entire award. Certain damages, namely those relating to the condition of the reality when defendants vacated the premises, as a matter of law are not recoverable by the landlord. New York Real

Property Law § 235-b(1) creates a warranty of habitability in "every written or oral lease or rental agreement for residential premises." This appears to cover—at a minimum—the water damage to the floors caused by a leaky roof. The New York Court of Appeals has interpreted § 235-b as a legislative remedy "to compel . . . landlord[s] to make necessary repairs or provide essential services." *Park West Management Corp. v. Mitchell*, 47 N.Y.2d 316, 325, 391 N.E.2d 1288, 1292, 418 N.Y.S.2d 310, 314, *cert. denied*, 444 U.S. 992 (1979). *See also, e.g., Kachian v. Aronson*, 475 N.Y.S.2d 214, 218, 123 Misc.2d 743, 746-47 (N.Y.C. Civ. Ct. 1984) (warranty covers water leakage). We reject appellee Walling's contention that the warranty is limited to conditions that endanger life, health, and safety, because the warranty extends to maintenance of the premises "in accord with the uses reasonably intended by the parties," *Park West Management Corp.*, 47 N.Y.2d at 325, 319 N.E.2d at 1293, 418 N.Y.S.2d at 315. The district court mistakenly believed that the lease could vary such terms. The statute, however, expressly voids all contractual attempts to make a residential tenant surrender rights under the warranty. N.Y. Real Prop. Law § 235-b(2). Only damage caused by the tenant's "misconduct" is exempt by the statute. *Id.* § 235-b(1). Since the district court did not apply the statute, no determination was made as to the scope of the warranty in this case and its effect on the damages. Accordingly, we remand this issue to the district court for a reassessment of the damages relating to injury to the residential property.

We next address appellants' statute of limitations argument. Under the alternative theory of conversion advanced by Walling at trial and charged by the court, some furnishings were missing or damaged beyond repair in 1979 when he and his niece last viewed the premises, and others were sold at a tag sale held sometime between 1979 and 1982. The district court erroneously concluded that the statute of

limitations began to run in 1982. In conversion actions, however, the statute of limitations ordinarily begins to run when the conversion takes place, rather than when the injured party discovers the injury and makes a demand for the property. *See Al-Roc Prods. Corp. v. Union Dime Sav. Bank*, 74 A.D.2d 834, 834, 425 N.Y.S.2d 525, 526 (2d Dep't 1980) (mem.); *Guild v. Hopkins*, 271 A.D. 234, 244, 63 N.Y.S.2d 522, 531 (lst Dep't 1946), *aff'd*, 297 N.Y. 477, 74 N.E.2d 183 (1947); *Pollack v. Warner Bros. Pictures, Inc.*, 266 A.D. 118, 120, 41 N.Y.S.2d 225, 226 (lst Dep't 1943) (*per curiam*); *cf. Lehman v. Lehman*, 591 F. Supp. 1523, 1527 n.20 (S.D.N.Y. 1984) (only where defendant committed "no overt act of conversion by an unlawful sale or disposition of the property" does statute of limitations begin to run when demand for property is refused). The tag sale and the defendants' removal of property might have started the limitations period running as to some items as early as 1979. The three-year statute of limitations applicable to property actions, N.Y. Civ. Prac. L. & R. 214(4) (McKinney Supp. 1988), would therefore bar tort claims for goods converted before April 9, 1981.

Nonetheless, because the appellants' liability "had its genesis in [a] contractual relationship," *Sears, Roebuck & Co. v. Enco Assocs., Inc.*, 43 N.Y.2d 389, 396, 372 N.E.2d 555, 558, 401 N.Y.S.2d 767, 771 (1977), in the form of a lease, Walling was entitled to elect a contractual remedy for the loss of the missing items and be governed by the six-year contractual statute of limitations. *See id.; see also Video Corp. of America v. Frederick Flatto Assocs.*, 58 N.Y.2d 1026, 448 N.E.2d 1350, 462 N.Y.S.2d 439 (1983); *Baratta v. Kozlowski*, 94 A.D.2d 454, 460-64, 464 N.Y.S.2d 803, 807-10 (2d Dep't 1983).

The election of remedies should have been made at trial at a time within the discretion of the trial judge. *Baratta*, 94 A.D.2d at 464, 464 N.Y.S.2d at 809. As the statute of limitations for contractual actions is six years, N.Y. Civ.

Prac. L. & R. 213(2) (McKinney Supp. 1988), Walling not surprisingly requested the court to charge the jury on a contract claim. As we have said, the district court disregarded Walling's request and charged the jury only on the conversion claim, failing, however, to disallow the time-barred conversion claims. Had the court properly permitted the contractual claim to go to the jury, however, we conclude that the result would be unchanged. Because the court refused to charge the jury on punitive damages, the tort damages awarded to Walling, which were equivalent to the value of the property, were identical to contractual damages for appellants' failure to turn over the items at the end of the lease.

Finally, we conclude that appellee Mary Holman was properly dismissed as a defendant in this case, as she was served more than three years after any alleged conversion of the property, and at no time entered into any contractual relationship with Walling which would permit recovery under the more generous statute of limitations. *Cf. Sears, Roebuck*, 43 N.Y.2d at 396-97, 372 N.E.2d at 558-59, 401 N.Y.S.2d at 771.

Judgment affirmed in part, reversed in part, and remanded to the district court for a recalculation of damages.

Order of District Court, Dated May 15, 1989, Granting Holman's Motion in Part and Denying Leave to Amend Answer

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

L. METCALFE WALLING,

Plaintiff, 84 Civ. 2180 (CMM)

-against-

RICHARD A. HOLMAN, *et al.*,

Defendants.

METZNER, Senior District Judge:

Defendant Richard A. Holman moves for several items of relief.

Holman seeks a protective order pursuant to Fed. R. Civ. P. 26(c) to quash a notice of deposition in aid of execution. This motion is granted. A final judgment has not been entered in this case. Permitting a deposition on what plaintiff considers the amount of the partial judgment to be would only lead to multiple proceedings. Furthermore, a supersedeas bond has been posted by the defendant which adequately secures the judgment for the plaintiff.

The application for sanctions to be imposed against plaintiff is denied as not justified in this case. The motion for the protective order is joined with another motion by defendant unrelated to this application, and with his papers in opposition to plaintiff's motion for summary judgment.

Holman also seeks permission to file an amended answer. This motion is denied for essentially the same reasons set forth in the order denying the same requested relief by codefendent Wall Street Reports and Intelligence Bulletin, Inc.

In addition I should point out that this defendant did not raise the impact of New York Real Property Law § 235-b in either his answer to the complaint or in the pretrial order on the original trial. On appeal defendant, in his brief, set forth the issues for review. No mention is made of section 235-b and its impact in favor of abatement of rent. Under the discussion of the issue as to the claimed impropriety of the dismissal of the counterclaim, the section is referred to in connection with defendants' entitlement to recover moneys paid for repairs and the value of services rendered. However, the Court of Appeals affirmed the order dismissing the counterclaim. The proposed amendment is an attempt to circumvent that ruling.

The motion to amend is denied.

So ordered.

Dated: New York, N.Y.
May 15, 1989

/s/ Charles M. Metzner

U. S .D .J.

Decision and Order of Judge Metzner Dated June 23, 1987, Denying Motion to Take Depositions Pending Appeal

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

L. METCALFE WALLING,

Plaintiff,

-against-

84 Civ. 2180 (CMM)

RICHARD A. HOLMAN, and WALL STREET REPORTS AND INTELLIGENCE BULLETIN, INC.,

Defendants.

METZNER, Senior District Judge:

Defendants move to take the deposition of several persons pending appeal pursuant to Fed. R. Civ. P. 27(b). The purpose of the rule is to perpetuate testimony in the event of further proceedings in the district court. It is not a substitute for discovery. "It is available in special circumstances to preserve testimony which could otherwise be lost." *Ash v. Cort.*, 512 F.2d 909, 912 (3d Cir. 1975).

L. Metcalfe Walling. This person is the plaintiff. His deposition had been taken by the defendants before trial. He was thoroughly cross-examined by defendants at the trial. The existence of the issue for which this deposition is now requested was known at the time of the trial. While Walling is 79 years old, he exhibited great vitality at the trial. The application is denied.

Alexander Walling. This person is the son of the plaintiff. He testified at the trial and was subject to cross-examination by defense counsel. His testimony dealt with many of the very points concerning which defendants want to depose him. Furthermore, the statement that he may not be within the subpoena power of the court in the event of a new trial is too speculative a reason to support

the motion. Finally, it is inconceivable that on the facts of this case the son would not be called as a witness by the father. This application is denied.

Ida Bellotti. This person is a witness who was called by the defendants at the trial. Her deposition had already been taken by plaintiff. All of the matters referred to by defendants on this motion were either explored at the trial or could have been explored at the time. The application is denied.

Gladys Walker. This is a prospective witness whom the defendants claim they will call if a new trial is ordered. The court in a companion motion has denied an application for a new trial based on the claimed discovery of new evidence, which refers to this witness. The claim that Mrs. Walker "is advanced in years" is a conclusory statement which will not sustain the request. Factual details must be presented from which the court may determine the propriety of the request. The application is denied.

Mrs. Monroe Long. This is a prospective witness in the event a new trial is ordered. Her testimony was available at all times before the original trial, but defendants saw fit not to call her. Furthermore, the claim, as in the case of Alexander Walling, that the witness may not be within the subpoena power of the court in the event that a new trial is ordered, will not sustain the motion. The application is denied.

In a pretrial hearing in this case, Judge Cedarbaum apparently denied the request for the identity of the investigator for the purpose of deposition. That is the law of the case and the application is denied.

So ordered.

Dated: New York, N.Y.
June 23, 1987

/s/ Charles M. Metzner

U. S .D .J.

Decision and Order of Judge Metzner Denying Defendants' Motion for Judgment N.O.V. and for a New Trial

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

L. METCALFE WALLING,

Plaintiff, 84 Civ. 2180 (CMM)

-against-

RICHARD A. HOLMAN, and WALL STREET REPORTS AND INTELLIGENCE BULLETIN, INC.,

Defendants.

METZNER, Senior District Judge:

Defendants move for judgment n.o.v. and for a new trial. A motion to set aside the verdict was made in the courtroom after the verdict was announced by the jury and was denied by the court. No motion for a directed verdict was made by the defendants at the conclusion of the evidence.

The failure to move for a directed verdict at the close of the evidence precludes a motion for judgment n.o.v. Fed. R. Civ. P. 50(b).

The motion for a new trial must be considered to be included in a motion to set aside the verdict, although not explicitly set forth. I will entertain the additional specifications advanced by defense counsel.

Nothing has been shown in these specifications to warrant a reversal of the court's original determination.

For example, the amount of claimed damages was worked out by counsel at the end of the trial and their

agreements were referred to in the court's charge to the jury.

Furthermore, counsel for plaintiff did not conduct himself improperly in his summation to the jury. He was referring to Walling's testimony as to what Mrs. Bellotti told him. The conflict between the two versions is for the jury to resolve.

Finally, there is a claim of newly discovered evidence. This refers to the testimony of Mr. Holman's housekeeper at the time he was living in the premises. Mr. Holman made no effort to produce this witness at trial, and therefore his failure to do so cannot be used as the basis for a new trial. *Alison v. United States,* 251 F.2d 74 (2d Cir. 1958). Her testimony would have buttressed defendants' version of the facts, but would not have resolved the disputed issues. Such testimony probably would not have changed the result. Fed. R. Civ. P. 59.

Motion denied.

So ordered.

Dated: New York, N.Y.
June 23, 1987

/s/ Charles M. Metzner

U. S .D .J.

Decision and Order of Judge Metzner Denying Motions to Amend the Judgment Entered April 1, 1987

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

L. METCALFE WALLING,

Plaintiff, 84 Civ. 2180 (CMM)

-against-

RICHARD A. HOLMAN, and MARY HOLMAN, his wife, WALL STREET REPORTS AND INTELLIGENCE BULLETIN, INC.,

Defendants.

METZNER, Senior District Judge:

The court has before it motions by plaintiff Walling and defendant Wall Street Reports and Intelligence Bulletin, Inc., to amend the judgment heretofore entered on April 1, 1987. The motions could not be ruled upon until the notice of appeal taken by the defendants from that judgment was withdrawn. The withdrawal was effected by a stipulation and order entered on November 6, 1987.

The issue raised by the motions is whether the counterclaim asserted in defendants' answer should be dismissed with or without prejudice.

The answer contained a counterclaim that defendant Richard Holman recover the value of work, labor and services rendered for the benefit of the plaintiff. The pretrial order makes no mention of this counterclaim. While there was some testimony adduced at trial that could be considered as relating to the counterclaim, no request was made that the courterclaim be submitted to the jury for determination. Some post-trial motions were made but no reference therein was made to the counterclaim.

In *Dawson v. G. Malina, Inc.*, 463 F. Supp. 461 (S.D.N.Y. 1978), the court was presented with a counterclaim raised by the answer and referred to in the pretrial order. However, no proof was offered as to any damages defendants may have suffered, nor was there any mention of the counterclaim in post-trial motions. The court considered the counterclaim to have been abandoned by the defendants. The judgment entered in the case provided: "5. That the defendant's counterclaim against plaintiff is hereby dismissed with prejudice; . . . "

Fed. R. Civ. P. 41(a), (b) and (c) would indicate that in the circumstances a dismissal in this case should be with prejudice. See also *Casto v. Arkansas-Louisiana Gas Co.*, 597 F.2d 1323 (10th Cir. 1979).

The judgment heretofore entered in this case is amended by adding after "Intelligence Bulletin, Inc.," the following provision:

"and it is further

ORDERED, ADJUDGED AND DECREED: that the counterclaim against plaintiff is hereby dismissed with prejudice."

So ordered.

Dated: New York, N.Y.
November 12, 1987

/s/ Charles M. Metzner

U. S .D .J.

Final Judgment on Remand

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

L. METCALFE WALLING,

Plaintiff, 84 Civ. 2180 (CMM)

-against-

RICHARD A. HOLMAN, and MARY HOLMAN, his wife, WALL STREET REPORTS AND INTELLIGENCE BULLETIN, INC.,

Defendants.

FINAL JUDGMENT ON REMAND

The amended judgment in this matter of December 10, 1987, having been affirmed in part, and reversed in part by the United States Court of Appeals for the Second Circuit, and having been remanded for recalculation of damages by mandate issued April 17, 1987; and

This court having determined that plaintiff is not entitled to $110 for refuse removal as a matter of law, plaintiff having withdrawn his claim for damage to the floors in the sum of $1,950 and for damage to the pool filter in the sum of $401, and the parties by stipulation having settled damage to plaintiff's piano and damage to all of the items in the possession of the plaintiff's niece, it is,

ORDERED, ADJUDGED AND DECREED:

1. that plaintiff have judgment in the principal sum of $42,713.50, plus interest at 9% per annum from May 15, 1982 through April 3, 1987, amounting to $18,776.85, for a total of $61,490.35, against defendants Richard A. Holman and Wall Street Reports and Intelligence Bulletin, Inc.

2. that post-judgment interest run from the date of filing of the original verdict, to wit, April 3, 1987, at the rate then prevailing (6.04%).

Dated: June 27, 1989
New York, New York

/s/ Charles M. Metzner

Charles M. Metzner
U. S .D .J.

Consented as to interest calculations and form:

/s/ Cletus P. Lyman 6/21/89

Cletus P. Lyman,
Attorney for Plaintiff

/s/ Samuel N. Greenspoon 6/22/89

Samuel N. Greenspoon,
Attorney for Defendant
Wall Street Reports and Intelligence Bulletin, Inc.

/s/ Richard A. Holman, Pro Se 6/23/89

Richard A. Holman,
Defendant Pro Se

Excerpts from Trial Transcript

Colloquy

(168) A. Buy something I happen to like, yes, if I am not here, and I am oft times out of the country.

MR. LYMAN: Okay. I have nothing further of this witness, thank you.

THE COURT: Cross-examination?

MR. O'DWYER: I have no questions.

THE COURT: You may step down.

THE WITNESS: That's it?

THE COURT: Next witness.

(Witness excused)

THE COURT: Do you have any deposition testimony that you intended to read?

MR. LYMAN: Yes, your Honor.

THE COURT: Why don't you do it now.

MR. LYMAN: Your honor, I had scheduled a reader to read it with me, but if the reader—

THE COURT: Can you read question and answer?

MR. LYMAN: Excuse me?

THE COURT: Unless it will tire you, you may read both portions.

MR. LYMAN: Well, your Honor, under the circumstances—

THE COURT: How long is it?

MR. LYMAN: I have one deposition to be read almost in its entirety.

(169) THE COURT: Mr. Walling, do you want to be a reader? Come on up here. Come on, let's go, I can't sit

around doing nothing, neither can the jury. Take the box, he will tell you what he wants you to read.

MR. O'DWYER: Your Honor, may I inquire whose deposition?

THE COURT: Certainly.

MR. LYMAN: Yes, your Honor, this is the deposition of Ida C. Bellotti.

THE COURT: Ida C. Bellotti.

MR. O'DWYER: I object to it, your Honor.

THE COURT: What grounds?

MR. O'DWYER: There is no reason—Ms. Bellotti is available.

MR. LYMAN: Your Honor, may I submit the deposition?

THE COURT: Yes. Does Ms. Bellotti live in New York?

MR. LYMAN: She lives up in the Bedford area and she—

THE COURT: That's within 100 miles of the courthouse.

MR. LYMAN: Yes, your Honor, and I would like to read this deposition under the provisions for a person who is unable to attend because of illness and also—

(170) THE COURT: What is the proof that she is ill?

MR. LYMAN: Your Honor, if you would turn to page 16, line 21 of the deposition. This deposition was taken specifically for trial with notice to that effect.

MR. O'DWYER: Your Honor, may I say that I am reliably informed that she was playing golf last week.

THE COURT: I have before me a sworn statement that she has difficulty. Did you read it?

MR. O'DWYER: I read it previously, your Honor, but that's a sworn statment as of what, last October?

THE COURT: December.

MR. O'DWYER: December

THE COURT: Yes.

MR. O'DWYER: Well, whatever her state of health was at that time, I can tell you that it is materially improved.

THE COURT: Well she says she has arthritis in both knees, "Very difficult for me to get on a train, steps are high and I have difficulty walking up and down stairs, so it is a problem to get around."

You were represented, were you not, at that deposition, the defendant?

MR. LYMAN: Yes.

MR. O'DWYER: I assume so, your Honor.

MR. LYMAN: Yes, your Honor, it was specifically (171) made known that this deposition was being taken not for discovery but because it was needed for trial. It was after the discovery.

THE COURT: I will take it, Mr. O'Dwyer.

MR. O'DWYER: If your Honor please, may I suggest that on the basis of what we have here that there is nothing to prevent these people from getting a limousine and taking her down—

THE COURT: I will take the deposition, Mr. O'Dwyer.

MR. LYMAN: At this time I will ask Mr. Walling to read statements that were made by Ida Bellotti in response to questions which were asked of her on October 22nd, 1986, in Bedford, New York. The questions may have been asked either by myself who was there representing Mr. Walling or by another attorney who was there representing Mr. Holman and Wall Street Reports. Unless I otherwise indicate, the questions are being asked by me.

MR. O'DWYER: Your Honor, may counsel approach the bench?

THE COURT: Yes.

(At the side bar)

MR. O'DWYER: Your Honor, after this deposition, Ida Bellotti was approached by the plaintiff who took her around to the area which is supposed to be the premises (172) involved. She said that what she saw was not of those premises and she has given us an affidavit to that effect.

Now, if your Honor please, I would like either to submit the affidavit with the deposition, but these are the facts which I presume not known to the plaintiff's lawyers—

THE COURT: If he wants to do it he can. If you want to gainsay what she says, you produce it, I won't take the affidavit. You tell me she can walk around and play golf.

MR. O'DWYER: That's what she told us.

THE COURT: You can't have it both ways, I'm sorry. If he wants to read it he can.

(In open court)

THE COURT: Go ahead.

MR. LYMAN: Starting on page 3, Mr. Walling.

MR. WALLING, JR.: Page 3. Yes.

THE COURT: "Q. What is your name?"

MR. WALLING, JR.: I am to read this?

THE COURT: You are.

MR. WALLING, JR.: I am?

THE COURT: You are.

MR. WALLING, JR.: Didn't know this would happen.

THE COURT: It's early in the morning, you got plenty of pep.

(173) MR. WALLING, JR.: "A. Ida Bellotti.

"Q. What is your address?

"A. Post office box 43, Bedford, New York 10506.

"Q. Mrs. Bellotti, what is your occupation?

"A. I own an antique shop in Bedford.

"Q. I have a business card with your name on it could you tell me if that is your current business?

"A. Yes, it is.

"Q. The card is Antiques Two. I would like this card to be made Bellotti deposition Exhibit 1.

"Would you briefly summarize your education?

"A. Graduated from high school, Bedford Hills High School 1941, and I attended Catholic University, Washington, D.C. for a year and a half, then I switched to Packard Junior Business College in New York City in 1943, and that's it.

"Q. Would you briefly summarize your career since graduating?

"A. Oh, wow, let's see, that's going back. I worked for the War Production Board from 1942 through '46, U.S. Government employee, then I got married and my husband was in the service and I traveled with him for a while. Then after the war, we settled back here in Bedford. (174) That's where we were from originally, and I raised a son and then I went back to work in 1967, Fox Lane High School and I taught English as a second language. I took some courses and taught English as a second language until 1977 when I retired and started the antique business in Bedford and I am still there.

"Q. What was your background in antiques at the time you went into the antique business?

"A. I was a collector, just a collector. I was loved antiques and collected them whenever I could afford them, and then when I decided to go into business, I had practically enough in my house to start a business with, I had accumulated so much, and that's what I did and with a friend who—we shared the shop, we each have our separate businesses, but she has her own and I have my own and we share time and space. That's why we call it Antiques Two, T W O, for that reason.

"Q. Are you familiar with a home formally owned by L. Metcalfe Walling also known as"—it says "Matt Walling" —"on Millertown Road in Bedord?

"A. I knew where he lived. I knew Mrs. Walling, I worked with her, I think, on the library committee for a few years in Bedford and I knew her in the school too at the P.T.A. and stuff years ago.

"Q. Could you in your own words briefly (175) identify by description the home that you know to be where the Wallings lived?

"A. I am not—I can't because I really was never inside the house.

"Q. Can you say where it is, what type of home it is?

"A. I thought—I can't remember. It was a modern-type house. I don't know if he built it or bought it, I really don't know. I think it is the second house on the right going into Millertown from Stone Hill Road or something. Yes, Stone Hill, off Stone Hill. I would say it's the second or third on the right close to the road. That's all I can tell you about it.

"Q. Did you have occasion to visit the home that you know to have been the Walling home at one time

"A. I went to an estate sale or garage sale or tag sale or whatever you want to call it there, but I don't know when

it was. I can't pinpoint the day or the date. It was a sale. I don't remember whether it was an advertised sale or whether it was posted, you know, on the end of the road and I was driving by and I saw the sign and decided to stop, but I did go to a sale there.

"Q. Were the Wallings there when you went to the sale?

"A. I didn't see them.

(176) "Q. Can you tell us the approximate year when you went to the sale?

"A. That's the problem. It might be '81 or '82, I am not sure, but I am really not, you know, I couldn't swear to it because I don't remember.

"Q. Please tell us in your own words to the best of your recollection what happened. You said somehow you knew about the sale, you are not sure whether it was advertised or posted.

"A. Right. I remember stopping and going to the sale and they had things on the terrace which is outside and it was open, and if I remember correctly, it was stone, the stone terrace, and then there were doors open. I don't know whether they were sliding doors or French doors. I wasn't that observant.

There was a room, you know, in there. It was either a family room or something and they had things for sale both in that room and on the terrace, and I, you know, noticed that most of the things were, you know, porcelains and Orientals and, you know, things that I was not interested in because I deal in American only, therefore I wasn't interested, and I don't think I was there ten minutes. I might just have walk around and looked at things and left. I was there a very short time because there was nothing that interested me.

(177) "Q. Do you recollect whether there were items from foreign countries?

"A. Well, I think the Chinese things, the Oriental things I am sure were from foreign countries. I can't swear to that either. I mean, they could be American imports, I really don't know.

"Q. But they were Oriental in type?

"A. Yes.

"Q. Now, when you say Oriental, you were not necessarily talking about Oriental carpets?

"A. No, they could be figurines and, you know, porcelain jars and jardinieres and that kind of thing, but I just vaguely remember, you know, that type of article, you know, being there, and I wasn't interested in it but it was mainly the same type. It was not a variety of things like most sales. They have both American, European Oriental, you know, but this was—I thought it was strictly—

"Q. Not American?

"A. Non-American.

"Q. Did you notice any African artifacts?

"A. I might have but I don't remember seeing them.

"Q. Do you recollect how extensive the number of items were?

(178) "A. There was quite a bit of—you know, I remember the space on the terrace was filled, you know, all the way around with furniture in the room. I don't remember how much was in there. I can't remember that. What sticks to my mind was the terrace more than the room.

"Q. Tell us with as much detail as possible what you saw in the terrace. You might begin by telling how large the terrace appeared to be?

"A. Oh, God, I can't even tell you that. Maybe it was roughly 15 by 20, and that's a very rough estimate. I am not very good at that.

"Q. Were there few things on the terrace or was it full of items?

"A. If I remember, you know, it seemed to me it was filled, but it was filled around the border of it, you know. The center was empty. I don't remember what was there. I do remember a few Oriental pieces and I can't even pinpoint those because I wasn't interested.

"Q. Were there items of furniture as well as—

"A. I think there were, but I am not sure.

"Q. Were the smaller pieces such as the porcelains on the floor of the terrace, were they up and about on pieces of furniture?

"A. There were probably both, I really don't (179) remember.

"Q. I would like to see if we could pinpoint this time a little more with reference to your career and any other events which we might have a record of. Were you in the antique business at this time?

"A. Yes, I was.

"Q. Can you therefore say with certainty that the sale occurred after 1977?

"A. Yes.

"Q. Do you know if the sale was while the home was occupied by Richard and Mary Holman?

"A. That I don't know.

"Q. Do you know if the home was occupied?

"A. No, I don't. It wouldn't concern me anyway. You know, when I go to sales I don't know whether they are occupied or not.

"Q. Let's see if we can get an approximate date by a process of elimination. We are here on October 22nd, 1986.

Can you say with certainty that the sale was not in '86?

"A. Definitely not in '86.

"Q. Can you estimate how many years back?

"A. The only way I can go back is if you know when the girl who was hired by the Walling family came in. She was doing, you know, checking various antique shops to (180) find out if we had seen or heard of any of these items that were on her list, and she said she was working for the Walling family, and I was the one who said to her, "Gee, I went to a tag sale there." So it had to be before that date.

Now, I don't know when she came in, I can't remember specifically , but I had been to the sale before that, maybe six months before she came in. Do you have any idea when she was investigating for the family?"

MR. LYMAN: I don't know if I should read the next statement, it's not a question.

THE COURT: What line are you up to?

MR. LYMAN: 22. I would skip that.

THE COURT: Unless we are not on the same page—what page are you on?

MR. LYMAN: 11, we just finished line 21. The witness turn the tables and asked me a question.

THE COURT: Hold it. I would admit lines 20 through 24, "I don't recollect."

MR. LYMAN: That, of course, is my statement. "Do you have any idea when she was investigating for the family?" She asked me this question.

THE COURT: I would leave it out.

MR. LYMAN: Okay. Going on then to line 3 on page 12.

(181) MR. O'DWYER: Your Honor said line 24, the woman says she can't recollect.

THE COURT: Wait. Read 23.

MR. LYMAN: Would you, 23, Mr. Walling?

MR. WALLING, JR.: 23?

THE COURT: Yes.

MR. WALLING, JR.: "A. No, then we could pinpoint it that way. I don't—I can't say."

THE COURT: Keep going.

MR. WALLING, JR.: Sorry.

"A. I wish I could help you out, but I can't help you date-wise.

MR. LYMAN: "Q. Do you recollect whether it was in your first year or two of business?

"A. It might have been, so that's why I would say I opened in—I think I opened in December of 1980, so it would have to be '81 or '82 and it has to be at least two or three years ago, so that's how I am trying to figure it out. It might have been in '81 and I don't know whether it was spring or fall or summer. I just don't remember because we go to so many sales. It had to be '81 or '82.

"Q. You previously testified about something happening in 1977 and you were thereafter going into the antique business. Is '77 the year you retired from teaching?

(182) "A. Right, I retired in 1977 and I didn't do anything for a few years.

"Q. Then you went into the antique business?

"A. Right, it was '79 that we opened the shop, so it was two years after that.

"A. Do you recollect at this time anything else about the sale?

"A. No, except for what I have told you, I really don't, because I was there such a short time, and the only reason I remember it was because I knew it was the Walling house, and when the young girl came in, you know, asking us if we had—if anybody had been in selling things or that kind of thing, you know, that's the only reason why I even remember it because I knew the Wallings. I didn't know them well, I mean, I knew Mrs. Walling better than I knew Mr. Walling. I had worked with her several times, but I knew where they lived.

"Q. Now, you say that you had never been inside the Walling house before?

"A. No.

"Q. Had you had an opportunity to see the Wallings collection of antiques and furniture and—

"A. No, I never did.

"Q. I see you brought with you a copy of an appraisal.

(183) "A. Yes."

MR. LYMAN: That's all I wish to read from the deposition.

THE COURT: Mr. O'Dwyer, do you wish to read any of it?

MR. O'DWYER: Let me just see. Excuse me a moment, your Honor.

(Pause)

MR. O'DWYER: Yes, your Honor, I would like to read the balance.

THE COURT: Go ahead.

MR. O'DWYER: We are down at line 20.

THE COURT: Page?

MR. O'DWYER: Page 13, your Honor.

BY MR. O'DWYER:

"Q. That was prepared for Mr. Walling and previously been marked as Exhibit D 4 to the Richard Holman deposition. Are you able to say with certainty from the descriptions that are provided there whether any items mentioned in that appraisal were items on sale at the tag sale?"

THE COURT: Before you go on, Mr. O'Dwyer, is Exhibit D 4 the appraisal in evidence here so we know what the question refers to? We have to know what Exhibit D 4 is.

(184) MR. O'DWYER: I know it has been marked as an exhibit during the deposition, but whether it is an exhibit in evidence here or not, I do not know, your Honor.

THE COURT: Mr. Lyman?

MR. LYMAN: Yes, your Honor, I can answer that question. That's the Drexler appraisal which was referred to yesterday. It has not been introduced, I don't believe, at this time. It has been referred to.

THE COURT: Okay. Go head. Drexler appraisal. All right. You are up to the top of page 14, line 3. Answer, Mr. Walling.

BY MR. WALLING, JR.:

"A. I couldn't pinpoint any one piece on this list. It would be unfair for me to say yes, I remember this or that. I don't, I just do not.

"Q. Are there items on, I believe, the Drexler appraisal?

"A. Yes, this is it.

"Q. Are there items on the Drexler appraisal which"—there is an objection to that, your Honor. I will go back to the one which is—the next one at line 19.

"Q. Have you had an opportunity to look at the description of item 1 through 115?

"A. Yes.

"Q. To the best of your recollection, could (185) any of these items have been among the items on the tag sale?

And you may answer the question, page 15. Skip the objection.

"A. No, I have to say no, because the list covered such a variety from, you know, African to Royal Doulton to Martha Washington, you know. I can't possibly say that, you know. It would be the same type because, I agree, it's not type. You have Queen Anne, you have Victorian, you have more Moroccan, Indian, Chinese, New Guinea Central Republic, Royal Doulton, which is English. There is such a variety of things on this list."

MR. LYMAN: Your Honor, objection. Unfortunately that can't be understood without reading the objection of Mr. Winfield on the preceding page that was skipped.

THE COURT: You don't have to read the objection. Go ahead.

MR. LYMAN: The reference to type.

MR. O'DWYER: "Q. Are you saying you can't answer the question because—

"A. No, I can't say that, you know, I saw any of these things are that sale.

"Q. I understand, but you can't say that you didn't see them either?

(86) "A. No, I would say that I can't honestly say that anything on this list I saw there, I just—

"Q. But you can't say it wasn't there either?

"A. No. because I don't know.

"Q. I am still trying to understand the answer to your question a little bit. Are you saying that—maybe you could just explain your answer a little better.

"A. Yes. What I am saying is that according to this list, I couldn't honestly say that these things were there or any—you can't call this a type because there are so many different types of antiques on this list, and what I remember seeing was, you know, the Oriental pieces and maybe—so that I couldn't, you know, compare in any ways things that are here with what I saw, you know, and say yes, I think I saw one of those. I can't do that because I wouldn't—

"Q. Is that because you don't recollect what you saw?

"A. Right, I just don't remember. I can't pinpoint it.

"Q. Do you recollect whether or not there were any other people at the sale?

"A. I think there were, but I—there were other people who parked in front of me and went in and there were people on the terrace walking around, but I (187) don't remember who they were or what they looked like.

"Q. I understand you have some physical or medical problems which would present a problem for your appearing as a witness in the United States District Court for the Southern District of New York, Foley Square?

"A. Yes.

"Q. Would you briefly identify those medical problems?

"Q. I have arthritis in both knees and it is very difficult for me to get on a train, you know, the steps are so high and I have difficulty walking up and down stairs, so it is a problem to get around."

MR. O'DWYER: That's the end of it. Your Honor, I move to strike the testimony.

THE COURT: Denied. Next witness. Mr. Lyman, we are waiting.

* * *

(324) IDA BELLOTTI,

called as a witness by the defendants, having been duly sworn, testified as follows:

DIRECT EXAMINATION
BY MR. O'DWYER:

Q. Is that Miss or Mrs. Bellotti?

A. Mrs.

Q. Mrs. Bellotti, where do you reside?

A. Pound Ridge Road, Bedford, New York

Q. What is your business or occupation?

A. I own an antique shop in Bedford.

Q. Mrs. Bellotti, in that connection, do you attend to various garage sales and auctions and various things of that kind, tag sales and whatnot?

A. Yes, I do.

Q. Do you buy and sell articles listed as antiques?

A. Right.

Q. Now, on a certain day did somebody approach you and ask you whether or not you had ever attended a tag sale at the Walling's' home?

THE COURT: That's testified to. Nobody approached her. She was asked on a deposition.

MR. LYMAN: Objection. It's leading. Why doesn't he ask what she was asked?

THE COURT: Go ahead.

(325) Q. Mrs. Bellotti, in a deposition by—by a deposition I mean lawyers came and asked you some questions, did you testify that you had been at the home of the Wallings at a tag sale?

A. I thought it was his home, yes.

Q. Were you mistaken about that?

A. Yes, I was.

Q. Do you know Mr. Walling?

A. I know of him. I can't say I really know him.

Q. Did you know his wife?

A. Yes. I worked with her.

Q. Did there come a time later on when you went to the home in Bedford that we have been talking about here and did you check that to see whether or not that was the house that you had been to that you had seen the tag sale at?

A. Yes.

Q. Was it?

A. No, it was not.

MR. O'DWYER: You may inquire.

CROSS EXAMINATION
BY MR. LYMAN:

Q. When was that tag sale, if you remember?

A. I could not pinpoint the date. We were trying to figure out when, but it was so long ago that I couldn't tell you. I really don't know.

REDIRECT EXAMINATION
BY MR. O'DWYER:

Q. With respect to the time that an investigator spoke to

you, an investigator spoke to you about this, do you remember that?

A. An investigator?

Q. Somebody approached you from the lawyer's office.

A. Yes.

Q. About how long before that was it that—how long before you spoke to that gentleman was it that you had seen some tag sale?

A. I really cannot pinpoint it. I can't give you a time.

MR. O'DWYER: All right.

THE COURT: Mr. Lyman.

RECROSS EXAMINATION
BY MR. LYMAN:

Q. Mrs. Bellotti, was your memory better on October 22, 1986 than it was today with respect to events that (327) occurred beforehand?

A. No.

Q. Was your memory better when you spoke to Mr. Walling's investigator?

A. No.

Q. Mrs. Bellotti, do you recall giving a deposition on October 22, 1986?

A. In Bedford Hills?

Q. Yes.

A. Yes, I do.

Q. And do you remember that on December 3, 1986 that deposition was mailed to you?

A. Yes.

Q. For signature?

A. Yes.

Q. And did you sign it?

A. Yes.

Q. Did you take it to a Notary Public and sign it there?

A. I think I did.

Q. Then you returned it?

A. And returned it, yes. I think so.

Q. And did it come to you with a request that you read it and sign it?

A. Yes. I think so.

(328) Q. Did you understand that the purpose of doing that was so that you could correct any errors that appeared in the transcript?

A. No.

Q. You didn't understand that you were supposed to—

A. No. nobody told me that.

Q. I would like to refer you to a copy of your deposition. You lived in Bedford all your life, haven't you?

A. Yes.

Q. I would like you to turn to page 5 line 18. Do you recall my asking.

"Q. Are you familiar with a home formally owned by L. Metcalfe Walling, also known as Mac Walling, on Miller Town Road in Bedford?

"A. I know where he lived. I knew Mrs. Walling. I worked with her, I think, on the library committee for a few years in Bedford and I knew of her in the school too, at the PTA stuff years ago."

Do you recall giving that testimony?

A. Yes.

Q. And is that correct?

A. Yes.

Q. And do you recall saying "Could you in your own words"—do you recall being asked, "Could you in your own (329) words briefly identify by description the home that you know to be where he lived?"

A. Yes.

Q. And then you testified "I'm not, I can't, because I really was never inside that house." Then do you recall being asked "Can you say where it is, what type of home it is?

"A. I thought I can't remember, it was a modern wooden-type house. I don't know if he built it or bought it, I really don't. I think it's the second house on the right going into Miller Town from Stone Hill Road or something, yes, Stone Hill, off Stone Hill. I say it's the second or third on the right close to the road, that's all I can tell you about it."

Do you remember saying that?

A. Yes.

Q. I would like you to turn to page 7 line 10. Do you remember being asked "Please tell us in your own words to the best of your recollection what happened."

You said somehow you knew about the sale, you're not sure whether it was advertised or posted; do you recall being asked that? Do you recall answering "Right, I remember stopping and going to the sale and they had things on the terrace, which is outside, and it was open, and if I remember correctly, it was stone, a stone terrace, and then (330) there were doors open, I don't know

whether they were sliding doors or French doors. I wasn't that observant. There was a room, you know, in there. It was either a family room or something. They had things for sale, both in that room and on the terrace, and I, you know, noticed that most of the things were, you know, porcelains and Orientals, and you know things that I was not interested in because I deal in American only and therefore I wasn't interested, and I don't think I was there ten minutes. I might have just walked around and looked at the things and left. I was there a very short time because there was nothing that interested me."

Do you remember giving that testimony?

A. Yes.

Q. Do you remember saying at your deposition that you couldn't come to court?

A. Yes.

Q. Because you couldn't get around; is that right?

A. I couldn't climb the stairs is what I said. The steps were a problem and I didn't want to have to go up and down steps. I have arthritis in both knees and it's difficult. That's what I said.

Q. Are you being paid anything to attend here today?

A. No.

THE COURT: How did you come down here?

THE WITNESS: In a limo.

THE COURT: Furnished by the defendant?

THE WITNESS: Yes. I think.

Q. Will you describe the house where you attended the tag sale.

A. As far as I can remember, it was a modern house and I pulled, you know, over on the side of the road and it was

a very short distance and it was a terrace. On the terrace with open doors and another room, and there were, you know, things that I was not interested in, as I said in the deposition, I didn't—was there a very short time, and I vaguely remember, you know, Oriental objects and that kind of thing.

Q. Do you recall being shown a picture of the Walling house?

A. No. No. I was never shown a picture.

MR. O'DWYER: What exhibit is that, sir?

MR. LYMAN: Plaintiff's Exhibit 26.

Q. You claim you were not shown that by an investigator?

A. No.

Q. You do recall speaking to an investigator for Mr. Walling; is that correct?

A. Yes.

Q. Do you remember telling the investigator that (332) you remembered African art?

A. No.

Q. Do you remember telling the investigator that the house was in great disarray at the time you visited it?

A. No.

Q. Do you recall telling the investigator that they were doing renovations on a swimming pool when you went to the tag sale?

A. No. Not at all.

Q. Do you remember shortly after the investigator contacted you in November of 1985 that Mr. Walling visited you to discuss these matters.

A. No. He called me.

Q. Do you recall telling Mr. Walling in that telephone call in 1985 that you remembered going to a tag sale at his house?

A. I thought it was his house. I did. But—I did say that.

Q. Do you recall telling Mr. Walling that you bought nothing because you thought the prices were high?

A. No.

Q. Do you recall telling Mr. Walling that you remembered seeing African art, which which you recalled from having been at his house when the Wallings were living there?

(333) A. No.

Q. Do you recall telling Mr. Walling that you saw furniture and valuable China and porcelains, small statutes and vases?

A. No.

MR. LYMAN: No further questions.

THE COURT: Go ahead.

REDIRECT EXAMINATION
BY MR. O'DWYER:

Q. Miss Bellotti, will you turn there to—

MR. O'DWYER: We have a stipulation by order of the court that the date that the investigator spoke to Mrs. Bellotti was August 6, 1985. Is that correct?

THE WITNESS: Are you asking me?

MR. O'DWYER: No. I am saying this to my associate counsel?

MR. LYMAN: Yes, your Honor, I gave him that information.

BY MR. O'DWYER:

Q. Mrs. Bellotti, will you turn in that paper that you have been reading here to page 10. Will you go down to line 19 there. Were you asked this question and did you give this answer to my question:

"Q. Do you know if the sale was while the home was occupied by Richard and Mary Holman?

(334) "A. That I don't know."

Did you make that reply?

A. Yes, I did.

Q. Was it the truth?

A. Right.

Q. Will you turn to page 11 line 17. Referring to the investigator. Were you—did you make this statement "Now, I don't know when she came in. I can't remember specifically, but I had been to the sale before that, maybe six months before she came in." Did you make that reply?

A. Yes.

Q. Was that factual?

A. Yes.

MR. O'DWYER: No further questions.

THE COURT: You may step down.

(Witness excused)

THE COURT: Next witness.

* * *

(446) Mr. Alex Walling testified that he had to take care of the floor down below that we are talking about here because of that.

THE COURT: That is right. But that is a claim they make, that you should have been taking care of it.

MR. O'DWYER: The roof, your Honor?

THE COURT: Isn't it?

MR. LYMAN: Your Honor, we feel that the entire floor had to be redone, not just where there was a leak, and we certainly claim that they ought to have done something rather than just let this water come in on the floor.

THE COURT: I agree. That is part of the item of damages. You can disagree with it in liability. But that is what they claim. This condition was created while he was there. He let it get worse. He could have stopped it, did nothing about it. That's their position.

MR. O'DWYER: Your Honor, but their position also was that it came from the bad roof and the tenant certainly can't be responsible for fixing the roof.

THE COURT: It depends on what the lease says.

Go ahead.

Q. You were asking me—I have lost the question.

(447) Q. All right. Let me see if I can put this in perspective. The lease says that you are supposed to leave the house in the same condition as when you came in.

MR. O'DWYER: No, it doesn't. It doesn't. There is reasonable wear and tear.

THE COURT: Excluded.

MR. LYMAN: Yes. With exceptions.

Q. Wear and tear. Okay.

What is your position on the floor? Let's start with move-in.

A. My position on the floor and the roof leaking is that this is clearly the responsibility of the landlord and whether it was in the lease or not, as I told Mac Walling

on several times, New York State has even enacted a law that makes it the landlord's responsibility. There was leakage from the roof. There was leaking in the roof before I came in. He had it fixed several times. In the end we couldn't get him to fix it. And there was a continual leaking that I called to his attention. We did our best to keep it. I didn't fix the roof. That is correct.

Q. When do you say you called it to his attention?

A. I called it to his attention by telephone

* * *

(525) MR. LYMAN: Well, I would agree, I just—

THE COURT: You may sit down. Next witness, Mr. O'Dwyer.

MR. O'DWYER: I rest.

THE COURT: The defendant rests.

Is there any rebuttal?

MR. LYMAN: Yes, your Honor.

THE COURT: The jury will be excused for a few minutes.

(The jury left the courtroom.)

(Recess.)

(In the courtroom in the presence of the jury)

THE COURT: Put on your rebuttal.

MR. LYMAN: The plaintiff will take the stand.

THE CLERK: Mr. Walling, you are still under oath.

(L. Metcalf Walling, resumed.

DIRECT EXAMINATION
BY MR. LYMAN:

Q. Mr. Walling, did you have occasion to speak to Ida Bellotti in November of 1985?

A. I did.

Q. Had you been informed that she had reported something about a tag sale—

THE COURT: Wait a second. That can't come in, (526) this conversion with Ida Bellotti, for any reason.

MR. LYMAN: I think it can, your Honor, in rebuttal to a recantation.

THE COURT: Of course not. We have no testimony here from Ida Bellotti.

MR. LYMAN: We have testimony from Ida Bellotti. First we had her depositional testimony on—

THE COURT: You mean the woman who went into the tag sale? I'm sorry. I got the names mixed up. Go ahead.

Q. Were you informed that she had some information relative to a tag sale?

MR. O'DWYER: I object to it as hearsay.

THE COURT: I will take it. She has testified.

A. I was.

THE COURT: She's testified before this jury. He is now entitled to talk about a conversation he had with her that contradicts it, maybe, I don't know. Go ahead.

Q. Did you make a record of the conversation that you had in 1985?

A. Yes, I did. I wrote a letter to you about it.

Q. What did Mrs. Bellotti say to you in this telephone conversation?

A. She said that she remembered our house and had been there often and had worked a good deal with my wife, and her husband had worked on the house too. And

she went (527) to a tag sale and recalled being surprised to see some of our African art pieces, which she had remembered from her visits to the house.

She described the house very accurately, which she knew well.

Q. Had her husband worked on the house?

A. Yes, he had.

Q. In what capacity?

A. I think he was one of the electricians we had. He worked a good deal on the house.

Q. Was there any doubt in your her mind in that conversation as to which house it was?

A. In her mind?

Q. Yes?

A. Not at all.

Q. You heard her deposition testimony whereby she described the house she went to, with the terrace, and that it was Miller Town Road, the second one on the right, I believe she said.

Was that an accurate description of the house?

A. Our house is the second one on the right, yes, on Miller Town Road. It is an accurate description.

Q. Is there any house in the vicinity of your house that is similar in architecture and design?

A. No. not remotely so.

(528) Q. Would you read the portions of that note which relates—

THE COURT: Don't read any portions of notes, to himself, to you. Just ask him questions and let him answer.

Q. Did Mrs. Bellotti specifically state that she remembered seeing your pieces for sale?

A. She did. She mentioned the African piece—

THE COURT: Hold it. Go ahead.

A. She mentioned the African pieces, furniture, valuable china, porcelains, small statutes and vases.

Q. Mr. Walling, I'd like you to refer to the Drexler appraisal. Are the items that you are charging are missing, which ones, when you last saw them—

THE COURT: When you say Drexler appraisal, you mean exhibit 23.

MR. LYMAN: Yes, your Honor.

THE COURT: Go ahead.

Q. The items that you are claiming are missing and you are charging Mr. Holman with, when you last saw them, which of these items, if any, were outside the main part of the house that was rented exclusively to Mr. Holman?

Which items were in the basement, the cellar, the guard house?

A. The items in the crawl space and basement were large cartons of—

* * *

During plaintiff's preparation of his case, he read the testimony of Mrs. Bellotti. That was permitted on the representation that she could not appear here personally to testify from the witness stand. Such testimony is entitled to the same consideration, and insofar as possible, is to be judged as to credibility and weight by you in the same way as if the witness had been present.

Now, there are, generally speaking, two types of evidence from which a jury may properly find the truth as to the

facts of a case. One is direct evidence such as the testimony of an eye witness, the other is indirect or circumstantial evidence which is the proof of a chain of circumstances pointing to the existence or nonexistence of certain facts. Circumstantial evidence is the proof of facts from which a fact in issue may reasonably be inferred. You may draw such inferences as reason and common sense lead you to draw from facts which you find to have been proven.

Circumstantial evidence is not on any different or lower plain than direct evidence. No greater degree of certainty is required of circumstantial evidence. The law simply requires that you find the facts in accordance with a preponderance of all of the evidence in the case, both direct and circumstantial.

* * *

Colloquy

MR. LYMAN: And I would just like to restate my objection to failing to charge on the contract claim with respect to the missing items.

THE COURT: I dismissed that claim at the end of your case.